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No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner.

vs

JAMES R. MCDONOUGH, Interim Secretary, Florida Department of Corrections, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is habeas corpus the exclusive federal remedy for a death-sentenced inmate to challenge the state's standard protocol for execution, or can 42 U. S. C. § 1983 be used to bypass the limitations Congress has placed on habeas corpus?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In 1996, Congress enacted a landmark reform of the law of habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996, to curb the rampant abuses that had occurred up

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

to that time, particularly in capital cases. Petitioner in this case seeks to evade the limitations imposed by Congress by captioning his pleading as a civil rights complaint instead of a habeas petition. Such evasion is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Clarence Hill murdered Pensacola Police Officer Steve Taylor *twenty-three years ago.*

> "On October 19, 1982, appellant stole a pistol and an automobile in Mobile, Alabama. Later that day, appellant and his accomplice, Cliff Jackson, drove to Pensacola and robbed a savings and loan association at gunpoint. When the police arrived during the robbery, appellant fled out the back of the savings and loan building. Jackson exited through the front door, where he was apprehended immediately. Appellant approached two police officers from behind as they attempted to handcuff Jackson. Testimony established that appellant drew his pistol and shot the officers, killing one and wounding the other." *Hill* v. *State*, 477 So. 2d 553, 554 (Fla. 1985) ("*Hill I*").

To say that Hill's case has been extensively reviewed would be an understatement. On the first appeal, the Florida Supreme Court affirmed the conviction but reversed the sentence based on denial of a challenge for cause, although the views of the juror in question fell well short of the automatic vote rule later announced in *Morgan* v. *Illinois*, 504 U. S. 719, 729 (1992). Cf. *Hill I*, *supra*, at 555. After a second penalty trial, the Florida Supreme Court affirmed the death sentence. *Hill* v. *State*, 515 So. 2d 176 (Fla. 1987) ("*Hill II*"), cert. denied, *Hill* v. *Florida*, 485 U. S. 993 (1988). State postconviction relief was denied on the merits. See *Hill* v. *Dugger*, 556 So. 2d 1385 (Fla. 1990).

After a Federal District Court found fault with the harmless error analysis in *Hill II*, the Florida Supreme Court reopened the appeal, reweighed the aggravating and mitigating factors, and reaffirmed the death sentence. *Hill* v. *State*, 643 So. 2d 1071, 1072-1074 (Fla. 1994) ("*Hill IV*"), cert. denied, *Hill* v. *Florida*, 516 U. S. 872 (1995). The Eleventh Circuit had stayed its proceedings pending *Hill IV*, see *Hill* v. *Moore*, 175 F. 3d 915, 920 (CA11 1999), and nearly five years after that decision it affirmed denial of habeas relief. See *id.*, at 930. This Court denied certiorari on January 10, 2000. See *Hill* v. *Moore*, 528 U. S. 1087 (2000).

Four days later, Governor Jeb Bush signed the bill changing Florida's primary method of execution to lethal injection. See *Sims* v. *State*, 754 So. 2d 657, 663, and n. 11 (Fla. 2000). The Florida Supreme Court considered on the merits a third postconviction petition by another inmate nearing execution and rejected claims very similar to those being made in the present case. See *id.*, at 659, 665-668, and nn. 17-20. The questions about dosage and claims of executions being "botched" in other states using lethal injection were known and being litigated at the time of enactment of the statute.

Hill pursued postconviction relief on an unrelated issue, see Pet. for Cert. 5-6, and denial of relief was affirmed by the Florida Supreme Court on May 13, 2005. See *Hill* v. *State*, 904 So. 2d 430 (Fla. 2005).

In the April 16-22, 2005 issue of The Lancet, a British medical journal, an article claimed that the level of anesthesia in American lethal injection procedures may be insufficient to prevent suffering. See Koniaris, Zimmers, Lubarsky, & Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, 365 The Lancet 1412 (2005).[2] In the correspon-

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2. Although The Lancet is a reputable journal, an accompanying editorial casts doubt on whether the editors maintain objectivity on this issue. For example, the editorial states, "Few experts believe that the threat of capital punishment is an effective deterrent." Editorial, Medical

dence section of a subsequent issue, the article was challenged in letters by multiple experts, and the original authors gave their reply. See Groner, et al., Inadequate Anaesthesia in Lethal Injection for Execution/Authors' Reply, 366 The Lancet 1073 (2005).

Governor Bush signed a new death warrant on November 29, 2005. See *Hill* v. *State*, 2006 Fla. Lexis 8, *2 (Jan. 17, 2006) ("*Hill VII*"). On December 15, after the warrant was signed, eight months after the article was published, and nearly six years after similar issues had been aired in *Sims*, Hill filed a new postconviction motion. Under Florida Rule of Criminal Procedure 3.851(h)(5), all such motions filed after issuance of the death warrant are subject to the requirements for successive motions. See *Hill VII*, at *4; see also *Bell* v. *Thompson*, 545 U. S. ___, 125 S. Ct. 2825, 2832-2833, 162 L. Ed. 2d 693, 704 (2005) (recognizing particular disruptiveness of new proceedings after scheduling of execution date). The circuit court denied the motion, and the Florida Supreme Court affirmed on January 17, 2006. Although the Florida Supreme Court's decision on the injection claim discusses the merits, see *Hill*

Collusion in the Death Penalty: An American Atrocity, 365 The Lancet 1361 (2005). Even the most elementary literature search, a strict prerequisite for a scientific article, would have disclosed the large and growing body of econometric evidence of deterrence. See, *e.g.*, Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003); Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453 (2003); Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004); see also Articles on Death Penalty Deterrence, http://www.cjlf.org/deathpenalty/DPDeterrence.htm (revised Mar. 27, 2006) (collecting abstracts of these and other studies). Although the deterrence debate is not concluded, the fact that the editors of The Lancet would blithely recite a trite and false claim of expert consensus, when there is in fact a robust debate in the published literature, indicates a bias and a disregard for normal standards of scientific publications which undercut the probative value of their acceptance of the Koniaris article.

VII, at *4-*8, the State characterizes it as a ruling that the claim was procedurally defaulted. See Brief in Opposition 9, n. 7.[3]

On January 20, Hill applied to the Eleventh Circuit for leave to file a successive habeas petition, claiming that he was mentally retarded. See *In re Hill*, 437 F. 3d 1080 (CA11 2006) ("*Hill VIII*"). The Court of Appeals denied it as untimely on January 24.

Also on January 20, Hill filed the present civil rights action in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief that lethal injection violates the Eighth Amendment. See *Hill* v. *Crosby*, 437 F. 3d 1084, 2006 U.S. App. Lexis 1674, *1 (CA11 2006) ("*Hill IX*"). The District Court dismissed it the following day on the ground that it was the "functional equivalent of a successive habeas petition." *Id.*, at *2 (internal quotation marks omitted). The Court of Appeals affirmed, see *id.*, at *2-*3, based on its earlier decision in *Robinson* v. *Crosby*, 358 F. 3d 1281 (CA11 2004). Hill petitioned for a stay and writ of certiorari. Justice Kennedy granted the stay the same day, and the Court granted the writ of certiorari the next day. Hill's stay application and petition for certiorari to the Supreme Court of Florida were denied January 24 and February 27, respectively.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1871, now codified at 42 U. S. C. § 1983, may not be used to circumvent the limitations placed on habeas corpus by the Congress and by this Court's precedents. *Preiser* v. *Rodriguez* settled that when the relief sought is within the scope of habeas corpus, that procedure is exclusive. If the limitations placed on habeas preclude relief, § 1983 cannot be used to obtain what Congress has decided to deny.

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3. If the decision had been on the merits, it would have preclusive effect in a § 1983 suit. See *Allen* v. *McCurry*, 449 U. S. 90, 103-104 (1980).

Shorthand references in noncapital cases to the scope of habeas as "the fact and duration of confinement" are not controlling. The underlying principle is that the habeas remedy is exclusive for claims within its scope. Habeas is well established as the proper procedure for penalty phase and method of execution claims going back over a century, even though neither type of claim seeks to shorten the duration of confinement. Habeas is available for method-of-execution claims when they are timely raised, even when the state changes its method. It is not available in this case because of petitioner's choice to delay until the eleventh hour, and Congress's prohibition of such late claims must not be circumvented.

ARGUMENT

I. The rule of *Mitchum v. Foster* should not be extended beyond its purpose.

A. Mitchum v. Foster.

On its face, the Anti-Injunction Act, 28 U. S. C. § 2283, would seem to preclude the injunction that petitioner seeks in this case. "A court of the United States may not grant an injunction to stay proceedings in a State court except as *expressly* authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis added.) Justice Brandeis, writing for a unanimous Court, described the predecessor statute in *Hill* v. *Martin*, 296 U. S. 393, 403 (1935) (emphasis added; footnotes omitted):

> "The prohibition of § 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by

its ministerial officers; *applies not only to execution issued on a judgment*, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

Petitioner brought the present action under 42 U. S. C. § 1983. That statute authorizes a "suit in equity" for violations of federal rights. It says nothing about staying state court actions. Indeed, at the time of *Mitchum* v. *Foster*, 407 U. S. 225 (1972), it did not mention actions in other courts at all. Yet *Mitchum* held, "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.*, at 238. Applying that standard to the intent of the Reconstruction Congress, *Mitchum* held that § 1983 "falls within the 'expressly authorized' exception" to the Anti-Injunction Act. *Id.*, at 243.

A leading federal courts casebook asks rhetorically, "Didn't Mitchum read 'expressly authorized' to mean 'impliedly authorized'? Is that a tenable position?" R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's Federal Courts and the Federal System 1162 (5th ed. 2003). Yes, it did, and no, it isn't. *Mitchum* is judicial disregard of unambiguous statutory language of the most blatant kind. For justification, the opinion relied on caselaw that predated the 1948 enactment of the present statute, see 407 U. S., at 234-235, combined with a Revisor's Note that the statute was intended "to restore 'the basic law as generally understood and interpreted prior to the Toucey[4] decision.' " *Id.*, at 236.

It is far from "evident" from this Note that the statute extends beyond "the specific holding of *Toucey*," cf. *ibid.*, to encompass the entire pre-1948 jurisprudence. The Note hedges with the word "generally," and the *Mitchum* opinion can muster only one example of a pre-1948 case where a federal statute

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4. *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118 (1941).

that does not specifically refer to other court proceedings was held to create an exception. See *id.*, at 234-235, and nn. 12-17. The one case, referred to in note 17, was an emergency regulation in wartime, decided after *Toucey*, not before. Yet even if the Note did have the sweeping meaning the *Mitchum* Court read into it, it would contradict the fundamental principle that legislative history cannot override unambiguous statutory language. "No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover 'flies' or 'mosquitos,' and tell the courts that it really covers 'ducks.' " *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611, n. 4 (1991). By the same token, a Revisor's Note cannot strike the word "expressly" from the statute, yet that is exactly what *Mitchum* allowed it to do.

Although wrongly decided, *Mitchum* is now a precedent of long standing. It is also a statutory interpretation precedent, which gives it extra weight in the *stare decisis* calculus. See, *e.g.*, *Neal* v. *United States*, 516 U. S. 284, 295 (1996). *Amicus* CJLF therefore does not suggest that it should be overruled. It is entirely plausible that subsequent Congresses have decided to leave *Mitchum* in place because the damage that it might have caused has been effectively contained by the rules of *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973) and *Younger* v. *Harris*, 401 U. S. 37 (1971).[5] *Preiser* is discussed in Part II, *infra*, and *Younger* is discussed in Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Nelson* v. *Campbell*, No. 03-6821, pp. 10-15. When applying the *Preiser* and *Younger* rules, however, it is helpful to keep in mind just how shaky is the foundation of authority for federal courts to enjoin the execution of state judgments at all.

The holding of *Mitchum* rests entirely on the Court's conclusion that Congress wanted the federal courts to be able

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5. A post-*Mitchum* amendment to § 1983, Pub. L. 104-317, § 309(c), 110 Stat. 3853, limits injunctions against judicial officers but implicitly authorizes them in unusual circumstances.

to enjoin state court proceedings under the Civil Rights Act in certain extreme circumstances. See 407 U. S., at 242. Where the reason for *Mitchum*'s rule ends, its rule should end. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). Injunctions against state court proceedings under § 1983 should not be issued in circumstances where issuance is contrary to the intent of a later-enacted statute, and a last-minute method-of-execution claim in a state capital case is precisely such a circumstance.

B. The Harris Case.

In the debate over the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the proponents repeatedly cited one case as the premier example of what was wrong with the system. That was the case of Robert Alton Harris, whose execution culminated in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992) and *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (*per curiam*). See, *e.g.*, 141 Cong. Rec. 4111-4112 (1995) (statement of Mr. Cox); *id.*, at 14734 (statement of Sen. Feinstein); *id.*, at 15019 (statement of Sen. Specter). In that case, a challenge to the standard method of execution which had been in use for decades was deliberately withheld through multiple rounds of litigation, including an appeal, nine state habeas petitions, and four federal habeas petitions, only to be filed in a civil rights suit a few days before the scheduled execution. See *Gomez*, *supra*, at 653 (four prior federal habeas); Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 322 (1992) (chronology, noting ninth state habeas petition, execution date set for April 21, 1992, civil rights suit filed April 17). "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez*, *supra*, at 654.

In *Gomez*, this Court did not allow the use of § 1983 to circumvent the successive petition rule of *McCleskey* v. *Zant*, 499 U. S. 467 (1991). Congress responded by enacting a new

successive petition rule, more stringent than *McCleskey*. See 28 U. S. C. § 2244(b); *Felker* v. *Turpin*, 518 U. S. 651, 656-657 (1996). No language was included to specifically prohibit use of § 1983 to evade the new rule. None appeared to be needed. The precedents of *Gomez* and *Preiser* should have been sufficient.

In passing AEDPA, Congress confirmed this Court's disapproval of the tactics used in the Harris case. Congress raised the hurdle for successive petitions and their accompanying stays several notches higher than this Court's case law. Given that the *Mitchum* rule is based on an inference of congressional intent, the intent of the 104th Congress should also be considered in its application. That Congress intended to sharply limit federal court interference with state capital judgments after the first federal petition. The *Preiser* rule, properly applied, will implement that intent.

II. The Civil Rights Act may not be used to circumvent Congress's limits on habeas corpus.

A. The Specific and the General.

This case brings the Court once again to the well-traveled intersection between the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the federal habeas corpus statute for state prisoners, 28 U. S. C. § 2254. See *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475, 482-484 (1973). The rule of the road is well established that habeas corpus, as the more specific of the two, has the right-of-way at this crossing, *i.e.*, it "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Preiser*, *supra*, at 489. Little more than reaffirmation of this principle is needed to answer the question presented in this case.

Federal court litigation by state-court criminal defendants has long raised delicate questions of federalism. See, *e.g.*, *Ex*

parte Royall, 117 U. S. 241, 252-253 (1886) (habeas); *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926) (civil rights); *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) ("special delicacy"). Both the habeas statute and the Civil Rights Act require striking a balance between the need to protect federal rights from state action and the need to avoid undue interference in the state's administration of its own laws. For the Civil Rights Act, these needs are accommodated through several doctrines of "abstention," the most important of which is the *Younger* doctrine. See *supra*, at 8. However, the problem has received more attention both from this Court and from Congress in the area of habeas corpus, because federalism is implicated in every § 2254 case, not just occasionally as it is in § 1983 litigation. This greater attention has resulted in a more developed body of law, with a finely crafted set of rules defining the limits of federal court action. Particularly where Congress has balanced the interests and defined the limits, courts and litigants must not be permitted to evade those limits and upset that balance simply by attaching a different label. See, *e.g.*, *Calderon* v. *Thompson*, 523 U. S. 538, 553-554 (1998) (limits on successive petitions guide discretion in motion to recall mandate, to preclude evasion).

The plaintiffs in *Preiser* had lost good time credits in prison discipline proceedings and sought to challenge those proceedings in Federal District Court in § 1983 actions, combined with habeas corpus petitions. See 411 U. S., at 476-482. The relief they sought was release from confinement. See *id.*, at 487. Court of Appeals panels in two of the three cases held that the cases were habeas petitions, not civil rights actions, and as such had to be dismissed for nonexhaustion. See *id.*, at 479-481. These decisions were reversed en banc. See *id.*, at 482. This Court reversed in turn.

Preiser discusses the scope of habeas corpus and the relief available under it as that procedure had evolved through the time of the decision, not just the very limited review of jurisdiction of the committing court available in the early

1800s. See *id.*, at 484-486. "In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus." *Id.*, at 487. If they succeeded, they would be released from custody earlier, the relief typically available in habeas. Again, the word "traditional" in this passage includes modern expansions of the scope of habeas. See *id.*, at 487-488. The *Preiser* Court rejected the position of the dissent that the Civil Rights Act should reach wherever habeas relief would not have been available in times past. See *id.*, at 488, n. 8.

The broad language of the Civil Rights Act, applicable to the case on its face, was not conclusive. *Preiser* held that the Civil Rights Act could not be used where the subject matter of the suit was so clearly within the scope of "the *specific* federal habeas corpus statute." *Id.*, at 489 (emphasis added). This conclusion was based squarely on the need to prevent evasion of congressional limits on habeas, of which exhaustion was the most important at that time. "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.*, at 489-490. Although *Preiser* speaks in terms of the exhaustion requirement and attacks on the fact and length of confinement, its underlying principle is somewhat broader. If the relief sought is the type of relief for which Congress has provided habeas corpus, then the Civil Rights Act must not be used to evade the limitations that Congress has placed on habeas and upset the balance that Congress has struck. It is no answer to say that this particular plaintiff cannot actually obtain relief on habeas. Two of the *Preiser* plaintiffs could not, because they had failed to exhaust state remedies. See *id.*, at 479-481. If Congress has decided that habeas relief should not extend to a prisoner in the petitioner's circumstances, that is precisely the policy determination that the courts must respect and not evade through the Civil Rights Act. See *id.*, at 490-491.

The rule of *Preiser* that the specific statute, with its limitations, controls in the area where the specific and general statutes overlap, see *Spencer* v. *Kemna*, 523 U. S. 1, 20 (1998) (Souter, J., concurring), is simply one application of a well-established principle. *Brown* v. *GSA*, 425 U. S. 820 (1976) illustrates the breadth of this principle. Congress had provided a remedy for discrimination claims by federal employees in 42 U. S. C. § 2000e-16. The plaintiff missed the deadline for judicial review of the administrative determination of his claim, and he tried to evade that requirement by invoking the general employment discrimination statute. See *Brown*, *supra*, at 823-824. Quoting *Preiser*, *Brown* held that the balance struck by Congress could not be evaded merely by attaching a different label. *Id.*, at 832-833. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.*, at 833. "In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies." *Id.*, at 834 (citing *Preiser*, along with cases on Federal Tort Claims Act, Suits in Admiralty Act, and venue requirements in patent cases). A specific remedy may be cumulative rather than exclusive when the language or history of the statute indicates that intent, see *id.*, at 833-834, but neither the habeas statute in *Preiser* nor the employment statute in *Brown* fell in that category. See *id.*, at 835. In each case, the specific remedy was exclusive, and the plaintiff could not invoke the general one, even though the specific one was no longer available to him.

In the cases since *Preiser*, the line between § 1983 and habeas has not always been easy to draw, but two consistent themes emerge. Section 1983 may not be used to obtain release from custody directly, nor may it be used to prevent the state from carrying out the judgment as entered.

In *Wolff* v. *McDonnell*, 418 U. S. 539, 554-555 (1974), § 1983 was not available to restore good time credits, but it was available for injunctive relief and damages for improper

procedures for revocation of good time. An injunction requiring certain procedures in a good time revocation hearing does not prevent the state from carrying out its judgment. The prison merely needs to hold a new hearing, and the prisoner meanwhile remains in prison. Similarly, *Gerstein* v. *Pugh*, 420 U. S. 103, 107, n. 6 (1975), permitted injunctive relief regarding pretrial detention hearings. Release was not asked, and there was not yet any state court judgment to interfere with.

Heck v. *Humphrey*, 512 U. S. 477, 478-479 (1994) involved a suit for damages by a prisoner who claimed his conviction was invalid but whose challenges to that conviction on appeal and in habeas corpus had been rejected. The majority avoided the collision between § 1983 and habeas by reading into § 1983 a requirement that if a claim necessarily implies invalidity of the conviction or sentence, the state judgment must be actually set aside in other proceedings before a § 1983 suit can proceed. See *id.*, at 486-487. This rule precludes the possibility that a prisoner could evade the habeas exhaustion requirement (and, since AEDPA, the deference standard) by getting a § 1983 judgment that resolves the validity of the criminal judgment and then attacking the criminal judgment in state court with a claim that federal judgment must be given preclusive effect.

Justice Souter concurred in the judgment, joined by three other Justices. He noted that an action for damages for unlawful confinement "would, practically, compel the State to release the prisoner." *Id.*, at 498. *Preiser* therefore applied, and requires "a state prisoner challenging the lawfulness of his confinement to follow habeas's rules before seeking § 1983 damages . . . ." *Ibid.* Under either approach, § 1983 cannot be used to prevent a state from carrying out its criminal judgment. Certiorari from this Court and habeas in the lower federal courts are the exclusive means Congress has provided for that purpose.

Three recent cases have applied the *Preiser/Heck* rule to prison discipline proceedings. In *Edwards* v. *Balisok*, 520 U. S. 641 (1997), the prisoner sought declaratory relief and

damages for alleged due process violations in the revocation of good-time credit, where the violations alleged would necessarily have rendered the revocation invalid. See *id.*, at 643, 648. The claim was therefore not cognizable under § 1983 despite the facts that the prisoner did not seek release and that the claim went to procedure rather than substance of the revocation. See *id.*, at 645. Injunctive relief might be available, however, to enjoin future due process violations. See *id.*, at 648-649. The Court also noted that the § 1983 suit must be dismissed, not stayed, to the extent it was precluded. See *id.*, at 649.

In contrast, *Muhammad* v. *Close*, 540 U. S. 749, 752-753 (2004) (*per curiam*) was a suit for damages for retaliatory prosecution of a charge on which the prisoner was acquitted. He did not challenge his discipline on another charge, on which he was convicted. See *id.*, at 753. Because the claim could not have any effect on the time served, there was no basis for habeas relief, and the *Heck* rule was inapplicable. See *id.*, at 754-755.

Wilkinson v. *Dotson*, 544 U. S. 74, 125 S. Ct. 1242, 1248, 161 L. Ed. 2d 253, 262 (2005) reviewed the cases and summarized the rule "that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought . . . , no matter the target of the prisoner's suit . . . —*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." Because the prisoners sought only new parole hearings, at which the authorities could deny parole, validity of confinement or its duration was not at issue, and § 1983 relief was not precluded. See *id.*, 125 S. Ct., at 1248, 161 L. Ed. 2d, at 263.

All of these cases are decided in the context of convictions for noncapital felonies punished by incarceration. Fact and duration of confinement, in this context, is equivalent to the ability of the state to enforce its criminal judgment. In each case where the state can continue to keep the prisoner in prison for the full duration that it would have imprisoned him without

federal court action, the § 1983 case can proceed. Where the outcome would result in a shorter duration of confinement, thereby altering the outcome of the state's criminal processes, habeas corpus is the exclusive federal remedy.

Translated into the realm of capital punishment, the equivalent of "release from confinement or a *shorter* stay in prison," see *ibid.* (emphasis added), is removal of the death sentence or *delay* in its execution. Just as a noncapital felon is barred from § 1983 if his claim would result in one day *less* in prison, so the capital murderer is barred if success would mean one day *more* delay in the state's execution of its judgment. We will return to this point in discussing the *Nelson* case *infra*, at 19-20, but first some background on habeas corpus and method-of-execution claims is necessary.

B. Habeas and Method of Execution.

Under *Preiser*, the threshold question in determining whether a § 1983 action is cognizable is simply one of whether the claim lies within the scope of habeas corpus. Although the use of habeas to litigate method of execution claims "may lack a perfect historical pedigree," cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (cause and prejudice test for procedural default), it is well established at this point. In the usual habeas case, the prisoner is contending that he should not have been convicted at all, and hence should not have been imprisoned at all, or else that his sentence of incarceration is too long and he should be released sooner. Hence, the dispute is typically stated as a challenge to the fact or duration of confinement. See, *e.g.*, *Porter* v. *Nussle*, 534 U. S. 516, 527 (2002); see also *Muhammad*, 540 U. S., at 750 ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . "). In challenges to the penalty phase of a capital case, the prisoner is contending that he *should* have been sentenced to life in prison, and so in a sense it is the prisoner who is arguing for a *longer* confinement than the state wishes to impose. Even so, penalty phase claims have

been routinely reviewed on habeas throughout the modern capital punishment era. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698-699 (1984). Congress enacted its most recent reforms of habeas corpus with capital cases as its central focus, see 141 Cong. Rec. 15018 (1995) (statement of Sen. Specter), and it did not eliminate the penalty phase litigation, so it must have intended that this practice continue.

Review of method of execution on habeas goes back at least to *In re Kemmler*, 136 U. S. 436 (1890), an Eighth Amendment challenge to electrocution. The Court denied an application for writ of error because the decision below was "so plainly right," *id.*, at 447, *i.e.*, on the merits, without any hint that habeas was an incorrect procedure. *Kemmler* arose on state habeas, so the Court would not necessarily have commented on the procedure if the state courts did not, but the same year the Court denied federal habeas on the same ground in *Jugiro* v. *Brush*, 140 U. S. 686 (1890). The Court summarily affirmed by citing *Kemmler*, a merits decision. In the modern era, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*) clearly contemplates that habeas is available for a method of execution claim, and at least hinting if not holding that habeas is the exclusive remedy. In *Stewart* v. *LaGrand*, 526 U. S. 115 (1999) (*per curiam*), a method of execution claim was decided on habeas on the basis of well-established habeas doctrine, with no question of the applicability of the procedure. See *id.*, at 119 (citing *Teague* v. *Lane*, 489 U. S. 288 (1989) and *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991)). Of course, the unexplained and unchallenged exercise of jurisdiction does not form a precedent which is binding in a case where the question is squarely presented, see *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996), but the long history of the exercise of this jurisdiction does at least illustrate that method of execution claims are established and accepted as being within the scope of habeas corpus.

The fact that Florida changed its method of execution to lethal injection after Hill's first federal petition was completed raises a question of whether habeas is a practical remedy for litigating a changed method. The Court's interpretation of both the successive petition and statute of limitations provisions of AEDPA indicate that it is.

The habeas statute of limitations begins on the latest of several events, one of which is "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U. S. C. § 2244(d)(1)(D). *Johnson* v. *United States*, 544 U. S. 295, 125 S. Ct. 1571, 1579, 161 L. Ed. 2d 542, 553-554 (2005) gave a practical construction to the parallel language of § 2255 to include a "necessary condition for relief," in that case the vacatur of a prior conviction. A prisoner in Hill's situation could hardly ask for relief from a method of execution before its adoption, so by analogy to *Johnson* the one-year clock began running when Florida changed its method.

The successive petition limitation has also been interpreted flexibly enough to accommodate this situation. If a first petition is dismissed as unexhausted, a new petition following exhaustion is not subject to the "second or successive petition" rule of 28 U. S. C. § 2244(b), even though it literally fits that description. See *Slack* v. *McDaniel*, 529 U. S. 473, 488 (2000). Similarly, a claim of mental incompetence to be executed previously dismissed as unripe could be reasserted when it became ripe. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644-645 (1998).

Hill could have filed a federal habeas petition challenging Florida's method of execution within one year of its adoption, plus tolling for any time a properly filed state petition was pending. Instead, he waited five years, after the federal statute had run, and after the death warrant had been signed, raising a procedural bar under clearly established state law. See *supra*, at 4-5. Habeas corpus is available for method-of-execution claims when it is diligently sought, but it is not available when

the claims are held in reserve to spring on the courts at the last minute to stop a scheduled execution.

C. Nelson v. Campbell.

Although all previous method-of-execution cases in this Court had been resolved on habeas or by applying habeas principles, the Court allowed a § 1983 suit in *Nelson* v. *Campbell*, 541 U. S. 637 (2004). The Court was careful to characterize its holding as "extremely limited," *id.*, at 649, and not resolving the issue regarding "method-of-execution claims generally." *Id.*, at 644.

Nelson involved a controversy over the use of a "cut-down" procedure for execution of an inmate whose veins were not accessible in the usual manner. See *id.*, at 640-641. This situation was distinguishable from the usual method-of-execution claim, because "the gravamen of petitioner's entire claim is that use of the cut-down would be *gratuitous*." *Id.*, at 645 (emphasis in original). Most importantly, the Court distinguished cases seeking to enjoin executions, noting, "Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution *as scheduled*." *Id.*, at 646 (emphasis added).

In other words, the Court believed that issuance of the requested injunction would have permitted the state to complete the execution of the judgment in the criminal case on the day it would have done so without federal court action.[6] This places *Nelson* in the same category of *Muhammad* and *Wilkinson*. See *supra*, at 15.

In practice, allowing such attacks on the State's standard method of execution in last-minute § 1983 litigation *will* impact the enforcement of criminal judgments. Unless every inmate is going to be allowed to specify his individual execution

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6. The *actual* aftermath of *Nelson*, to be described in the *amicus* brief of Alabama, is a different story.

method, the state will have to defend its standard protocol. Hearing that challenge will typically mean a stay of the execution, as happened in this case. Also, as in this case, it will typically mean further delay of justice which is already *very* long overdue. The *Preiser* iine of cases says that habeas is the exclusive remedy if success means interference with the state's criminal judgment, see *supra*, at 15, but "success" in the capital context can include a stay of execution, even if the state ultimately prevails. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson* v. *Wainwright*, 714 F. 2d 1495, 1506 (CA11 1983).

Nelson should be limited to its unusual facts. Challenge to the State's standard method of execution should be through habeas corpus. When the method is unchanged throughout the proceedings, habeas requires exhaustion of state remedies before the first federal habeas petition and then raising the claim in that petition. Otherwise, the claim is barred.

When, as in this case, the State changes methods after the first federal petition, the inmate must still invoke state remedies, if there are any, at the appropriate time. Hill did not do so, and his claim is defaulted. See *supra*, at 4-5. A claim under the Civil Rights Act does not lie, and there is no point converting this proceeding to a habeas petition.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

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Respectfully submitted,

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